

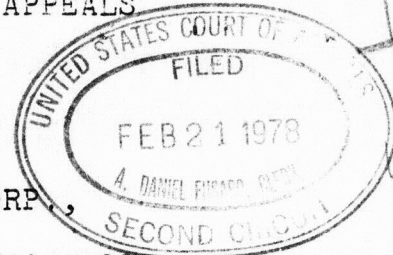
***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-6215

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT



PIERCE & STEVENS CHEMICAL CORP.,

Plaintiff-Appellee,

v.

UNITED STATES CONSUMER PRODUCT SAFETY COMMISSION,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLANT

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UNITED STATES CONSUMER PRODUCT SAFETY COMMISSION,

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLANT

QUESTION PRESENTED

Whether the district court erred in enjoining the Consumer Product Safety Commission from disclosing three documents requested under the Freedom of Information Act.

STATEMENT OF THE CASE

1. Nature of the Case

On October 2, 1975, Pierce & Stevens Chemical Corporation instituted this action to enjoin the Consumer Product Safety Commission from disclosing three documents to Adele Larson under the Freedom of Information Act, 5 U.S.C. 552, on the ground that the Commission did not comply with Section 6(b)(1) of the Consumer Product Safety Act, 15 U.S.C. 2055(b)(1). Two of the documents are reports of inspections of the Pierce & Stevens plant which "revealed possible labeling deficiencies and an alteration in the formulation of Hybond Reducer Cleaner," a product which allegedly caused the fire that destroyed Miss Larson's house. The remaining document is a related two-page letter. The three documents were prepared after Food and Drug Administration officials inspected the plant on November 12, 1969, and on October 20, 1970, pursuant to the Federal Hazardous Substances Act, 15 U.S.C. 1261 et seq. (These functions have been transferred to the Commission, 15 U.S.C. 2079.) Despite the Commission's protest that Section 6(b)(1) is inapplicable to Freedom of Information Act requests, the district court (Elfvin, J.) entered a preliminary injunction on October 26, 1977. The district court's order is reported at 439 F. Supp. 247 (W.D. N.Y., 1977).

2. The Facts

On February 19, 1975, Adele Larson informed the Consumer Product Safety Commission that she used "HI-BOND REDUCER, produced

by Pierce & Stevens" and that "[a] spontaneous fire resulted which destroyed my house and injured me" (App. 52).^{1/} Noting her intent to file suit against Pierce & Stevens, Miss Larson asked the Commission to provide her with a can of the product or a copy of its label. She also asked "whether you know of any history of problems connected with the use of this product" and whether "it [is] supposed to be sold by retailers to non-professionals." Ibid. The Commission sent copies of the labels to Miss Larson and informed her that it had been "unable to locate any records of accidents associated with this product in Commission files" (App. 53).

On April 3, 1975, Miss Larson wrote another letter to the Commission asking, among other things, "[d]oes the labeling conform with U.S. safety regulations" (App. 54). The Commission replied that "[i]nspections of the Pierce and Stevens establishment in Buffalo, New York in November, 1969 and October, 1970 revealed possible labeling deficiencies and an alteration in the formulation of Hybond Reducer Cleaner" (App. 55). Before providing Miss Larson with copies of the inspection reports, the Commission notified her that it had to allow Pierce and Stevens an opportunity to review the documents for confidential commercial and trade secret information which should not be released. Ibid.^{2/}

^{1/} "App." refers to the Appendix.

^{2/} 15 U.S.C. 2055(a)(2) provides:

(2) All information reported to or otherwise obtained by the Commission or its representative under this chapter which information

On April 22, 1975, the Commission sent the documents to Pierce & Stevens and asked whether it believed the documents contained any trade secrets or commercial information entitled to exemption from disclosure (App. 7-8). Plaintiff replied that the Commission should not disclose any of the documents since the Commission had not complied with Section 6(b)(1) of the Consumer Product Safety Act, 5 U.S.C. 2055(b)(1) (App. 9-18). Section 6(b)(1) requires that at least 30 days prior to the public disclosure of information pertaining to a manufacturer or labeler of a consumer product which would permit the public to ascertain readily the identity of such a manufacturer or labeler, the Commission shall give notice and provide the affected party with a reasonable opportunity to submit comments to the Commission regarding the information. The section further provides that:

The Commission shall take reasonable steps to assure, prior to its public disclosure thereof, that information from which the identity of such manufacturer or private labeler may be readily ascertained is accurate, and that such disclosure is fair in the circumstances and reasonably related to effectuating the purposes of this chapter.

2/ (Continued from page 3)

contains or relates to a trade secret or other matter referred to in section 1905 of Title 18 shall be considered confidential and shall not be disclosed, except that such information may be disclosed to other officers or employees concerned with carrying out this chapter or when relevant in any proceeding under this chapter. Nothing in this chapter shall authorize the withholding of information by the Commission or any officer or employee under its control from the duly authorized committees of the Congress.

Plaintiff asserted that the documents "contain highly prejudicial and erroneous misleading information"; that the Commission failed to take reasonable steps to assure that the information is accurate; and that disclosure is unfair and not reasonably related to effectuating the purposes of the Act. Plaintiff also asserted that the documents contain "confidential, privileged or trade secret information" as well as intra-agency memorandums protected from disclosure under Exemption 5 of the Freedom of Information Act (App. 9-18).^{3/}

The Commission rejected plaintiff's contention that it must comply with Section 6(b)(1) prior to releasing documents under the Freedom of Information Act stating its view that "the Commission's obligation with respect to alleged inaccuracies in documents subject to the disclosure requirements of the Freedom of Information Act is satisfied by providing the affected manufacturer with an opportunity to submit a statement concerning alleged inaccuracies or unfair treatment" (App. 36-37). The Commission added that "[i]f such a statement is received by the Commission within the 10 day period * * * it will be included in the Commission's response to the Freedom of Information requester." Ibid.

Additionally, the Commission accepted some of plaintiff's claims relating to trade secrets and confidential commercial or

^{3/} Exemption 5, 5 U.S.C. 552(b)(5), protects "inter-agency or intra-agency memorandums or letters which would not be available to a party other than an agency in litigation with the agency."

financial information (App. 31-32). Finally, the Commission rejected plaintiff's contention that the documents contain intra-agency memoranda which must be withheld from disclosure under Exemption 5. Ibid.

As earlier noted, plaintiff filed its complaint on October 2, 1975, seeking to enjoin the Commission from disclosing the documents (App. 3-6). On October 26, 1977, the district court entered a preliminary injunction and rejected the Commission's interpretation of Section 6(b)(1) to apply only when the Commission itself actively and publicly discloses information; not to a request for documents under the Freedom of Information Act. In the district court's view, 6(b)(1) applies "to all disclosures of information." The district court also held that 6(b)(1) contains particular criteria for withholding within the meaning of Exemption 3 of the FOIA, and that the Commission failed to comply with 6(b)(1) (App. 65-74). This appeal followed.

STATUTE INVOLVED

Section 6(b)(1) of the Consumer Product Safety Act (15 U.S.C.

2055(b)(1)) provides:

(b)(1) Except as provided by paragraph (2) of this subsection, not less than 30 days prior to its public disclosure of any information obtained under this chapter, or to be disclosed to the public in connection therewith (unless the Commission finds out that the public health and safety requires a lesser period of notice), the Commission shall, to the extent practicable, notify, and provide a summary of the information to, each manufacturer or private labeler of any consumer product to which such information pertains, if the manner in which such consumer product is to be designated or described in such information will permit the public to ascertain readily the identity of such manufacturer or private labeler, and shall provide such manufacturer or private labeler with a reasonable opportunity to submit comments to the Commission in regard to such information. The Commission shall take reasonable steps to assure, prior to its public disclosure thereof, that information from which the identity of such manufacturer or private labeler may be readily ascertained is accurate, and that such disclosure is fair in the circumstances and reasonably related to effectuating the purposes of this chapter. If the Commission finds that, in the administration of this chapter, it has made public disclosure of inaccurate or misleading information which reflects adversely upon the safety of any consumer product, or the practices of any manufacturer, private labeler, distributor, or retailer of consumer products, it shall, in a manner similar to that in which such disclosure was made, publish a retraction of such inaccurate or misleading information.

ARGUMENT

THE DISTRICT COURT ERRED IN ENJOINING THE COMMISSION FROM RELEASING DOCUMENTS UNDER THE FREEDOM OF INFORMATION ACT SINCE THE COMMISSION REASONABLY CONSTRUED SECTION 6(b)(1) OF THE CONSUMER PRODUCT SAFETY ACT TO APPLY ONLY WHEN THE COMMISSION ITSELF FOCUSES PUBLICITY ON IDENTIFIABLE PARTIES

A. Introduction

At issue in this case is the validity of the Commission's interpretation of Section 6(b)(1) of the Consumer Product Safety Act. In the Commission's view, that section was Congress' response to the problem of unfairness which may occur when a government agency focuses adverse publicity on identifiable parties. See generally E. Gellhorn, Adverse Publicity By Administrative Agencies, 86 Harv. L. Rev. 1380 (1973). Accordingly, the Commission's administrative practice has been to apply Section 6(b)(1) when the Commission actively and publicly discloses information either in the exercise of its explicit statutory duty to "disseminate * * * information relating to the [adverse effects of] consumer products", 15 U.S.C. 2054(a)(1), or otherwise in expressing its own views in a public forum through a Commission finding or statement made in a press release, press conference, speech or publication; but not to a request for documents under the Freedom of Information Act.^{4/}

^{4/} Professor Gellhorn has described the difference between the two processes (86 Harv. L. Rev. at 1421-1423):

The [FOIA] involves a question of the availability of government information to the public. Agency publicity, on the other hand,

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As the agency charged with the administration of the Consumer Product Safety Act, the Commission's construction of its provisions is entitled to great weight and is to be respected as long as it is reasonable. Udall v. Tallman, 380 U.S. 1, 16 (1965);

4/ (Continued from page 8)

involves affirmative action on the part of an agency or its personnel to bring information or activities to the attention of the public. The difference is particularly significant where the agency's affirmative steps cause or increase the harm suffered by the person identified.

With regard to the interests under the Freedom of Information Act, Congress has mandated that high priority be given to openness in government. However, this policy still places the primary burden of requesting and obtaining the information on the person seeking it; only reasonable requests are honored and the party desiring the information must pay for extensive searches as well as all copying costs. The congressional mandate with respect to publicity is quite different. Most government agencies lack explicit authorization to issue adverse publicity, and what authorization one can find limits the uses to which publicity may be put. Furthermore, questions of access arise at a different point in agency proceedings than questions of publicity. Adverse agency publicity frequently occurs either at an investigatory point when there is no significant interest in public access, or at a point when the complaint is already in the public domain. The main concern is therefore with fairness to the parties adversely affected. Access to information, on the other hand, seeks to uncover information on which investigation is complete but which has not yet been publicly disclosed. Then, the main concern is with confidentiality and protection of governmental processes. [Footnotes omitted.]

Friedman v. Berger, 547 F.2d 724, 731-732 (C.A. 2, 1976), certiorari denied 97 S.Ct. 1681 (1977); Perine v. William Norton & Company, Inc., 509 F.2d 114, 120 (C.A. 2, 1974). To sustain the Commission's interpretation, the Court need not find that the Commission's construction is the only reasonable one, or even that it is the result the Court would have reached in the first instance. Unemployment Comm'n v. Aragon, 329 U.S. 143, 153 (1946). The Court must find only that the Commission's interpretation "should be followed unless there are compelling indications that it is wrong." Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 381 (1969). These principles are particularly applicable where, as here, the administrative practice "involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." Norwegian Nitrogen Co. v. United States, 288 U.S. 294, 315 (1933); Shen v. Esperdy, 428 F.2d 293, 301-302 (C.A. 2, 1970). See also Schwartz v. Romnes, 495 F.2d 844, 851-852 (C.A. 2, 1974).

As we show below, the Commission's interpretation of Section 6(b)(1) is entirely reasonable and effectuates the will of Congress.

B. The Consumer Product Safety Act

Congress enacted the Consumer Product Safety Act for the express purpose of "protect[ing] the public against unreasonable risks of injury associated with consumer products." 15 U.S.C.

2051(b)(1).^{5/} To effectuate that Congressional purpose, the Commission is empowered with "comprehensive authority to take actions across the full range of consumer products to reduce or prevent product-related injuries." H. R. Rep. No. 92-1153, 92d Cong., 2d Sess. 21 (1972). Among the important and specific tools of the Commission is the Injury Information Clearinghouse. Congress established the Clearinghouse in section 5 of the Act, 15 U.S.C. 2054(a)(1), to "collect, investigate, analyze, and disseminate injury data, and information relating to the causes and prevention of death, injury and illness associated with consumer products" (emphasis added). While granting the Commission this broad power to disseminate adverse information about identifiable parties, Congress was mindful of the potential for abuse and it therefore established procedural safeguards in the very next section of the Act.^{6/} Under Section 6(b)(1), before publishing data which may

^{5/} Congress also intended the Act "to assist consumers in evaluating the comparative safety of consumer products", "to develop uniform safety standards for consumer products and to minimize conflicting state and local regulations" and "to promote research and investigation into the causes and prevention of product-related deaths, illnesses, and injuries." 15 U.S.C. 2051(b)(2-4).

^{6/} The potential for abuse was raised by Congressman Crane during the debates over the Consumer Product Safety Act (118 Cong. Rec. 31389 (1972)):

The Federal Trade Commission charged that Zerex was falsely advertised in a television commercial, charges which have since been proven to be untrue. The company, nevertheless, lost sales in 1971 and public confidence because of unfavorable publicity.

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adversely affect an identifiable manufacturer or labeler, the Commission must notify it of the damaging information, allow it a reasonable opportunity to supply the Commission with further information, and take reasonable steps to assure the information is accurate and its publicity fair and reasonably related to effectuating the purposes of the Act.

6/ (Continued from page 11)

What the FTC did was to call a press conference in November 1970 and make a "proposed complaint" against Du Pont, alleging, without proof, that the television commercial was misleading, that the antifreeze actually damaged automotive cooling systems, and that it had been inadequately tested. The Federal Agency then publicly threatened to ban the product.

The commercial in question showed a man stabbing a can of Zerex and streams of antifreeze gushing out and then sealing up. After the FTC charged that this demonstration was phony, newspapers across the country carried stories of the Commission's condemnation of Zerex.

Officials at Du Pont were not even informed of the FTC's action before the Washington press conference. Equally important is the fact that the FTC turned out to be wrong. It dropped the charge of false advertising. It dropped the charge that the product could cause damage. The FTC, in fact, found nothing wrong with the product in any way.

The financial damage had, of course, already been done. Du Pont counted 160 newspaper stories after the initial FTC accusation and only 80, half as many, a year later when the Agency admitted it had been wrong. Twenty front-page stories appeared the first time. The FTC's error received no first page placements a year later.

Thus, there can be no doubt that 6(b)(1) applies when the Commission affirmatively disseminates information. Indeed, Professor Gellhorn has cited 6(b)(1) as an example of how an agency can assure fairness while making affirmative disclosures. 86 Harv. L. Rev. at 1431. The Commission's view that Section 6(b)(1) applies only to such affirmative releases and not to requests for documents under the FOIA is reasonable and must be upheld because the legislative history shows that this is exactly what Congress intended. See Cass v. United States, 417 U.S. 72, 78-79 (1974); United States v. Duncan, 527 F.2d 1278, 1280 (C.A. 3, 1975) ("A statutory term * * * assumes meaning from the context in which it is used and from the backdrop of the congressional purpose in enacting the statute in question").

During the course of the Congressional hearings on the Consumer Product Safety Act, the participants uniformly viewed this provision as a way of assuring "truth in disclosure" when the Commission exercises its statutory power to disseminate information. As a representative from the General Electric Company succinctly explained:

[T]he public dissemination of the information so gathered carries with it a heavy responsibility. Issued under the dignity and with the apparent imprimatur of the U.S. Government, it will be repeated, summarized and carried by the media and so be used in the market place under circumstances and in a manner in which the government cannot control. If the information is premature, inaccurate or misleading, the consumers themselves will suffer. If it is identified with a company or product, it can have serious impact upon reputation, good will and market place results. Accordingly, we urge

that the power to disseminate information carry with it the responsibility to be sure of its accuracy and that truth in disclosure be the governing statutory principle.

Hearings on H. R. 8110 et al. Before the Subcomm. on Commerce and Finance of the Committee on Interstate and Foreign Commerce, 92d Cong., 1st and 2d Sess. 1065 (1971-1972). See also pages 306-307, 432, 446-447, 766, 910, 969, 1130, 1196-1197, 1210-1211, 1237, 1318. And see the testimony of Secretary Richardson of the Department of Health, Education and Welfare, Hearings on S. 983 Before the Committee on Commerce, 92d Cong., 1st Sess. 122-124 (1971).^{7/}

Moreover, Congressman Moss, the primary author of both the Consumer Product Safety Act and the Freedom of Information Act, indicated that the Acts' provisions were to be mutually independent:

^{7/} See also the following explanation of Section 6(b)(1) which appears in the House Committee Report:

Before disseminating any information which identifies the manufacturer or private labeler of a product, the Commission is directed to give the manufacturer or private labeler 30 days in which to comment on the proposed disclosure of information. This procedure is intended to permit the manufacturer or private labeler an opportunity to come forward with explanatory data or other relevant information for the Commission's consideration. There is no intention that the Commission be required to include a manufacturer's or private labeler's explanation in the materials which it determines to disseminate at the end of the 30-day period. This was suggested to the committee and rejected.

H. R. Rep. No. 92-1153, 92d Cong., 2d Sess. 32 (1972).

I would not want the information available under this act to be tied to the Freedom of Information Act guidelines. They permit too many items to be excluded from the public. I think we could draft guidelines here that would be more liberal and yet afford adequate protection where protection is really needed or desirable.

Hearings on H. R. 8110 et al., supra, at 910. Indeed, when Congress was conducting regulatory reform-oversight hearings regarding the Commission, former Chairman Simpson brought to Congressman Moss' attention the very question presented in this case and Congressman Moss was "inclined to agree" with the Commission's interpretation of Section 6(b)(1):

Mr. Simpson. As I have stated on other occasions, the Commission's openness policy has proven to be extremely successful, both from the point of view of agency credibility, and because it provides a very big opportunity for public scrutiny and participation in the activities of the agency. As a companion to our openness policy, the Commission has adopted an extremely liberal interpretation of the Freedom of Information Act. An interpretation which generally requires release of all material requested, notwithstanding the available withholding exemptions in the act. In other words, we interpret the FOI Act as just that, as Congress intended, a freedom of information act, not a protection of information act.

One point I would raise in this regard is the apparent conflict between section 6(b) of the Consumer Product Safety Act, which requires a 30-day delay and notification to an affected manufacturer if materials by which he can be identified are to be released to the public, and the requirement under the Freedom of Information Act that the requesting party be notified within 10 days of request of the availability of the desired materials.

The Commission has been dealing with this problem by interpreting section 6(b) as applying only to affirmative disclosures by the Commission, and the Freedom of Information Act as applying to passive release of information. We are now involved in what appears to be protracted litigation on this subject in two cases, and a third case was just filed against us this past Monday.

I believe consideration should be given by the Congress to a resolution of this conflict by modification or clarification of section 6(b) of the Consumer Product Safety Act, that the clarification should be along the lines that the Commission had adopted, that is, 6(b) only applies to affirmative releases.

Mr. Moss. Mr. Chairman, could you have suggested language submitted to us? We will give it careful consideration.

Mr. Simpson. I will be very pleased to do so. I believe that is what the Congress probably had in mind.

If you adopt any other interpretation of section 6(b), if you encompass it in the Freedom of Information Act, it would mean we must verify the accuracy of every piece of information before it can be released.

If a consumer complaint says this product is bad and we have to verify whether it is bad, we would never be able to release information.

Mr. Moss. As the primary author of both acts, I am inclined to agree with you.

Hearings Before the Subcommittee on Oversight and Investigation of the House Committee on Interstate and Foreign Commerce, 94th Cong., 2d Sess., Vol. IV, pp. 7-8 (January 30, 1976).

In addition, and perhaps most importantly, after the colloquy between Congressman Moss and former Chairman Simpson, Congress also addressed the question involved here and it, too, agreed with

the Commission. Congress amended the Consumer Product Safety Act in 1976 to "prescribe conditions under which the Commission may provide accident and investigation reports to other Federal agencies or State or local authorities engaged in activities relating to health, safety or consumer protection." H. R. Rep. No. 1022, 94th Cong., 2d Sess. 26 (1976). Congress provided that these other governmental authorities may not disclose to the public any information obtained under the Act until after the Commission complies with the requirements of Section 6(b). Id. at 27. Commenting on the added provision,^{8/} the conference committee explicitly stated

^{8/} Section 29 of the Act (15 U.S.C. 2078) was amended by adding the following new subsection

(e) The Commission may provide to another Federal agency or a State or local agency or authority engaged in activities relating to health, safety, or consumer protection, copies of any accident or investigation report made under this Act by an officer, employee, or agent of the Commission only if (1) information which under section 6(a)(2) is to be considered confidential is not included in any copy of such report which is provided under this subsection; and (2) each Federal agency and State and local agency and authority which is to receive under this subsection a copy of such report provides assurances satisfactory to the Commission that the identity of any injured person and any person who treated an injured person will not, without the consent of the person identified, be included in --

(A) any copy of any such report, or

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The requirement that the Commission comply with section 6(b) prior to another Federal agency's public disclosure of information obtained under the Act is not intended by conferees to supersede or conflict with the requirements of the Freedom of Information Act (5 U.S.C. 552(a)(3) and (a)(6)). The former relates to public disclosure initiated by the Federal agency while the latter relates to disclosure initiated by a specific request from a member of the public under the Freedom of Information Act.

Id. This recent expression of Congress' view is entitled to great weight, since

Subsequent statements of Congress about what it meant years earlier in enacting a law are "entitled to great weight in statutory construction." Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 380-381 (1969). Here we have Congress at its most authoritative, adding complex and sophisticated amendments to an already complex and sophisticated act. Congress is not merely expressing an opinion on a matter which may come before a court but is acting on what it understands its own prior acts to mean.

Mount Sinai Hospital v. Weinberger, 517 F.2d 329, 343 (C.A. 5, 1975), certiorari denied 425 U.S. 935 (1976). Accord, Federal Housing Administration v. The Darlington, Inc., 358 U.S. 84, 90

8/ (Continued from page 17)

(B) any information contained in any such report, which the agency or authority makes available to any member of the public. No Federal agency or State or local agency or authority may disclose to the public any information contained in a report received by the agency or authority under this subsection unless with respect to such information the Commission has complied with the applicable requirements of section 6(b).

(1958); Banco Nacional de Cuba v. Farr, 383 F.2d 166, 175 (C.A. 2, 1967), certiorari denied 390 U.S. 956 (1968); Sioux Valley Empire Electric Ass'n v. Butz, 504 F.2d 168, 173 (C.A. 8, 1974).^{9/}

9/ The district court in GTE II, see p. 26, infra, refused to give weight to the conference committee report on the mistaken belief that such statements "form a hazardous basis for inferring the intent" of an earlier Congress (App. 85-86). But neither of the cases relied upon by that court involve a clear statement of intent by a conference committee made at a time when Congress was amending the statute. On the contrary, in United States v. Price, 361 U.S. 304, 312 (1960), the legislative history only vaguely referred to the prior state of the law and the Court revealed that "the reports contain no clear statement as to Congress' view of then existing law." And in United States v. Philadelphia National Bank, 374 U.S. 321, 348 (1963), the subsequent statements were made merely by "some members of Congress, and for a time the Justice Department." In addition, those cases have cited United States v. United Mine Workers, 330 U.S. 258 (1947), as the foundation for the rule. But there, too, it is easy to understand why the Court refused to give any weight to the subsequent statements. As the Court explained (Id. at 281-282):

They were expressed by Senators, some of whom were not members of the Senate in 1932, and none of whom was on the Senate Judiciary Committee which reported the bill. They were expressed eleven years after the Act was passed and cannot be accorded even the same weight as if made by the same individuals in the course of the Norris-LaGuardia debates. Moreover, these opinions were given by individuals striving to write legislation from the floor of the Senate and working without the benefit of hearings and committee reports on the issues crucial to us here. We fail to see how the remarks of these Senators in 1943 can serve to change the legislative intent of Congress expressed in 1932, and we accordingly adhere to our conclusion that the Norris-LaGuardia Act did not affect the jurisdiction of the courts to issue injunctions when sought by the United States in a labor dispute with its own employees. [Footnotes omitted.]

The statements we rely on stand in marked contrast and are entitled to great weight.

(Continued on page 20)

There is no support in the legislative history for the conclusion that the Section 6(b)(1) procedures are to take the place of the Freedom of Information Act in governing disclosure of requested documents. If Congress had intended to substitute Section 6(b)(1) for the policy procedures by which the Freedom of Information Act establishes a public right to access of agency records, it would certainly have said so. Far from indicating any support for that conclusion, the legislative history provides ample support for the Commission's construction of Section 6(b)(1). The Commission's view, however, does not rest on this alone. It is also bottomed on the fact that the Section 6(b)(1) procedures simply are inconsistent with the procedures and underlying purposes of the Freedom of Information Act.

C. The Freedom of Information Act

1. Finding that section 3 (The Public Information Section) of the Administrative Procedure Act, 5 U.S.C. 1002 (1964 ed.),

9/ (Continued from page 19)

The court in GTE II also ruled that "the impact of the Conference Committee's statement is diminished by the failure of Congress to amend Section 6(b) in 1976, when it presumably knew" of the GTE I decision (App. 86). However, as the Supreme Court has stated, "[v]arious considerations of parliamentary tactics and strategy might be suggested as reasons for the inaction of * * * Congress" and, therefore, a court "walk[s] on quicksand when [it] tries to find in the absence of corrective legislation a controlling legal principle." Helvering v. Hallock, 309 U.S. 106, 121 (1940). The court in GTE II thus erred when it gave "weight to the nonaction of Congress." FTC v. Dean Foods Co., 384 U.S. 597, 608-611 (1966). Rather, what is important here is that the conference committee expressly agreed with the administrative construction.

was "full of loopholes which allow agencies to deny legitimate information to the public," Congress in 1966 enacted the "Freedom of Information" Act, 5 U.S.C. 552. S. Rep. No. 813, 89th Cong., 1st Sess. (1965), p. 3. The basic concern which led Congress to enact the new law was that "[a]llthough the theory of an informed electorate is vital to the proper operation of a democracy, there is nowhere in our present law a statute which affirmatively provides for that information." Ibid. The purpose of the 1966 Act, therefore, was to provide for the "legitimate information" which "an informed electorate" requires for "the proper operation of a democracy."

"Without question, the Act is broadly conceived. It seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands." Environmental Protection Agency v. Mink, 410 U.S. 73, 80 (1975). There are, however, exemptions from compelled disclosure. "But these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act. These exemptions are explicitly made exclusive * * * and must be narrowly construed." Department of Air Force v. Rose, 425 U.S. 352, 361 (1976).

Swift action is a key element of the Freedom of Information Act. Each agency, upon any request for identifiable records, "shall make the records promptly available to any person." 5 U.S.C. 552(a)(3). Within ten working days after the receipt of an

Information Act request, the agency must determine "whether to comply with such request and shall immediately notify the person making such request of such determination * * *." 5 U.S.C. 552(a)(6)(A)(1). And the agency must make a determination with respect to any appeal within twenty days. 5 U.S.C. 552(a)(6)(A)(11). These notably short administrative deadlines are complemented by procedures which give aggrieved citizens a speedy remedy in the courts. After a complaint is filed, the government must file its answer within thirty days instead of the sixty days generally available under Rule 12(a), Fed. Rules of Civ. Proc. 5 U.S.C. 552(a)(4)(C). Thereafter, the case shall "take precedence" and be "expedited in every way." 5 U.S.C. 552(a)(4)(D).

2. It is readily apparent that the Section 6(b)(1) procedures are inconsistent with the Freedom of Information Act. In the first place, 6(b)(1) requires the Commission to exercise a certain kind of control over the disclosure of information which is well-suited to the Commission's own statements but is at odds with the FOIA. By requiring the Commission to take reasonable steps to assure that disclosed information is accurate, that the disclosure is "fair in the circumstances" and "reasonably related to effectuating the purposes" of the Act, 6(b)(1) contemplates that the Commission consider the content of documents and revise information in a document prior to its release. Under the FOIA, an agency does not rewrite documents, produce or create material. Instead, the FOIA requires an agency to disclose only those existing documents "which the law requires the agency to prepare

or which the agency has decided for its own reasons to create." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 162 (1975). Accord, Nolen v. Rumsfeld, 535 F.2d 890 (C.A. 5, 1976), certiorari denied 97 S.Ct. 1707 (1977).

Moreover, an additional inconsistency exists with respect to 6(b)(1)'s requirement that the Commission publish a retraction if it finds that it had made public disclosure of inaccurate or misleading information. This makes sense where the Commission itself issues a statement. It is then "[i]ssued under the dignity and with the apparent imprimatur of the U.S. Government, it will be repeated, summarized and carried by the media and so be used in the market place under circumstances and in a manner in which the government cannot control." Supra, p. 13. But in the case of the FOIA, there is no apparent government approval. The agency releases only existing documents and thus it would not ferret out inaccurate or misleading information, it would not vouch for the content of documents, and therefore it would not publish this type of retraction.

The FOIA's requirement that agencies disclose only existing documents without vouching for their accuracy is quite reasonable. If the Consumer Product Safety Commission were required to assure the accuracy of all documents disclosed under the FOIA, it would place an "extremely serious administrative burden" and "serious financial drain" on the Commission which "would seriously impede [its] work" (App. 48). As of November, 1975, the Commission averaged approximately twenty FOIA requests for documents a day.

Ibid. ^{10/} Many of the requests are for "letters, accident reports, petitions for rulemaking, and complaints sent to it by consumers and others concerning the safety of products." 42 Fed. Reg. 54305 (October 5, 1977). ^{11/} The Commission "receives thousands of such communications each year." Ibid. The accuracy of these documents "cannot usually be determined simply from the face of such a record" which means the Commission would have "to investigate each record requested in some depth." Ibid. Even then, it may not be possible for the Commission to assure the accuracy of documents. Indeed, in this case, the Commission's Freedom of Information Officer reported that "there was no reasonably conceivable way to verify some of the information" in the five and six year old establishment inspection reports requested by Miss Larson (App. 48).

Furthermore, the thirty-day notice and comment procedure of 6(b)(1) alone would make it impossible for the Commission to comply with the specific requirement of the FOIA that agencies respond to FOIA requests within ten days and administrative appeals within twenty days. Manifestly, if the Commission were required

^{10/} It is noteworthy that FOIA requests have increased tremendously at a rate entirely unforeseeable following the 1974 Amendments to the Act. Open America v. Watergate Special Prosecution Force, 547 F.2d 605, 617 and n. 3 (C.A.D.C., 1976) (Leventhal, J., concurring).

^{11/} The Commission's proposed regulations implementing Section 6(b) are set forth at 42 Fed. Reg. 54304. The information cited above was included with that proposal as explanatory material.

to conduct in depth investigations for all documents requested under the FOIA, it would delay disclosure even longer. ^{12/}

Clearly, the Commission's interpretation of Section 6(b)(1) is the appropriate one since it carries out the purposes of both Acts. The Commission may aid consumers by exercising its statutory duty to generate information relating to the adverse effects of consumer products and, in doing so, utilize the 6(b)(1) procedures to assure "truth in disclosure." At the same time, the Commission may give full effect to the specific expedited procedures of the FOIA and make prompt disclosure of requested documents. Consequently, the interpretation conforms to the maxim of statutory construction which demands that, when possible, statutes

^{12/} The district court in GTE II, see p. 26, infra, did not agree that there is a conflict between the thirty-day notice and comment period of Section 6(b) and the ten-day time limit under the FOIA (App. 87-88):

The Court disagrees, because in 1972 when Congress enacted the Consumer Product Safety Act, the FOIA required only that an agency make records "promptly available" to any person requesting them. The ten-day requirement was not introduced until 1974, when Congress amended the FOIA. Given that Section 6(b) has not been amended since 1972, the differences between the time periods specified in Section 6(b) and the FOIA cannot be used to infer a Congressional intent to limit the application of Section 6(b) to affirmative disclosures. [Footnotes omitted.]

However, this time sequence does not alter the fact that there is an inconsistency between the two statutes. The Court's purpose in such cases is governed by the axiom that "courts should construe all legislative enactments to give them some meaning." Rosado v. Wyman, 397 U.S. 397, 415 (1970). Only the Commission's interpretation accomplishes this purpose.

should be construed so as not to be in conflict with each other. Morton v. Mancari, 417 U.S. 535, 551 (1974); A.P.W. Paper Co. v. F.T.C., 149 F.2d 424, 427 (C.A. 2, 1945), aff'd 328 U.S. 193 (1946); Araya v. McLelland, 525 F.2d 1194, 1195-1196 (C.A. 5, 1976).^{13/}

3. Despite the foregoing which conclusively shows that the Commission's interpretation of Section 6(b)(1) is reasonable, that interpretation has been rejected by the district court here citing and relying on another district court opinion in GTE Sylvania v. Consumer Product Safety Commission, 404 F. Supp. 352 (D. Del., 1975) (order granting preliminary injunction, hereafter "GTE I"), ____ F. Supp. ____ (December 8, 1977) (order granting permanent injunction, hereafter "GTE II"), appeal pending. Contrast National Ornament & Electric Light Christmas Ass'n v. Consumer Product Safety Commission, 526 F.2d 1368, 1372 (C.A. 2, 1975). The district courts ruled that the Commission's interpretation of Section 6(b)(1) "contravene[s] the legislative history

^{13/} As the Court in Morton v. Mancari stated:

The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective. "When there are two acts upon the same subject, the rule is to give effect to both if possible * * *. The intention of the legislature to repeal 'must be clear and manifest.'" United States v. Borden Co., 308 U.S. 188, 198 (1939).

of the section" (GTE II, App. 82) and is "directly at odds" with Exemption 3 of the Freedom of Information Act (Pierce & Stevens, App. 70; see GTE I, 404 F. Supp. at 369-370 and GTE II, App. 89). These decisions are erroneous and cannot stand.

In concluding that the Commission's interpretation of Section 6(b)(1) contravenes its legislative history, the court in GTE II simply cited to its first decision. The only legislative history cited there is testimony by Ralph Nader which the court pointed to for the proposition that "Congress was aware that FOIA requests for information gathered by the Commission would be forthcoming * * *." 404 F. Supp. at 370 and n. 76. We have no quarrel with the court's use of Mr. Nader's testimony for that obvious proposition. But there is nothing about the testimony that indicates a congressional intent to apply the 6(b)(1) procedures to FOIA requests. Indeed, we are somewhat surprised that Mr. Nader's testimony has been cited in favor of a proposition which would require time-consuming investigations that might result in substantially delaying disclosure.

This was not Mr. Nader's purpose. An examination of his testimony reveals that he was seeking less restrictions on disclosure and less industry input. He advocated a new independent agency with "new freedom of information procedures that would not be possible within a large, multifaceted department like HEW, with its demands for uniformity and its history of endless closed-door negotiations with industry." Hearings on H. R. 8110 et al., supra, at 897. He favored "a statement of congressional purpose

and substantive provisions that all information is public unless within the exemptions under the Freedom of Information Act."

Ibid. And he wanted Congress to "require the Commission to narrowly define the exempt categories, for example, by defining by use of specific examples, what is a 'trade secret,' and what is 'commercial or financial information, obtained from a person, and privileged or confidential.'" Ibid. Certainly, the district court has seriously misconstrued this testimony.

The district court's reliance on Exemption 3 of the Freedom of Information Act is similarly misplaced. That provision protects from compelled disclosure "matters that are specifically exempted from disclosure by statute provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. 552(b)(3).

Once it is established that Congress intended Section 6(b)(1) to apply only when the Commission itself actively publishes information, it is plain that the section is not a withholding statute within the meaning of Exemption 3 because Exemption 3 adds nothing to the protection that 6(b)(1) affords against improper disclosure. This is evident since before the Commission publishes information, in a press release for example, Section 6(b)(1) is either inapplicable because the Commission has not initiated any disclosure or the Commission is in the process of utilizing the 6(b)(1) procedures. If the Commission is unable to "take reasonable

steps to assure * * * that [the] information * * * is accurate, and that such disclosure is fair in the circumstances and reasonably related to effectuating the purposes" of the Act, the Commission withholds the documents pursuant to Section 6(b)(1). That section operates by itself; it is not necessary to bring it into play under Exemption 3. On the other hand, if the Commission is able to take such steps, it discloses the documents.

For similar reasons, even if Section 6(b)(1) were given an expansive reading and were somehow construed as a withholding statute within the meaning of Exemption 3, it would not protect from disclosure the documents Miss Larson has requested. Exemption 3 requires a twofold test. First, as pertinent here, one must consider whether the statute "establishes particular criteria for withholding." Secondly, even if the statute qualifies as an Exemption 3 statute, it is necessary to determine whether the documents at issue fall within the coverage of that statute. Assuming arguendo the first test is met in this case, the second test clearly is not since, as we have shown above, Section 6(b)(1) applies only to documents the Commission itself determines to disseminate.

This analysis illustrates how meaningless it is to consider Section 6(b)(1) as an Exemption 3 statute. The much more reasonable view, and the one we believe correct, is that Section 6(b)(1) operates independently from the FOIA and does not fall within the coverage of Exemption 3.

In sum, contrary to the district court's decision, Congress did not intend to compel the Consumer Product Safety Commission to use a special procedure for FOIA requests that is not required of any other agency. This stumbling block to the free flow of documents requested under the FOIA is especially anomalous in light of the Commission's broad mandate "to protect the public against unreasonable risks of injury associated with consumer products" and "to assist consumers in evaluating the comparative safety of consumer products." The Commission's interpretation of Section 6(b)(1), which carries out the purposes of both the Consumer Product Safety Act and the Freedom of Information Act and which would allow the Commission to fulfill its statutory responsibility under each statute, is the appropriate one and must prevail.

CONCLUSION

For the foregoing reasons, the preliminary injunction should be vacated. In addition, since plaintiff's complaint fails to state a claim upon which relief can be granted, the action should be dismissed.

Respectfully submitted,

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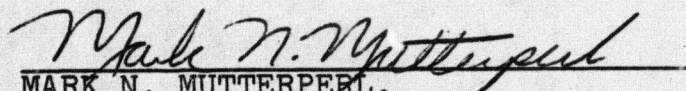
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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of February, 1978, I served the foregoing Brief for the Appellant upon counsel for appellee, by causing copies to be mailed, postage prepaid, to:

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